

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

United States of America,)	
Plaintiff)	
)	
VS.)	CASE NO. 3:09-CR-00247
)	
)	
Robert K. Mericle,)	
)	
Defendant)	
_____)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWIN M. KOSIK
WEDNESDAY, FEBRUARY 26, 2014, 10:00 A.M.
SCRANTON, PENNSYLVANIA

FOR THE PLAINTIFF:

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DIANA GILBRIDE, RMR, FCRR
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1 (10:00 a.m., convene.)

2 THE COURT: Okay. Good morning.

3 MR. CONSIGLIO: Good morning.

4 MR. ZINN: Good morning.

5 THE COURT: I just want to note for the record,
6 initially we scheduled this matter because the government filed
7 a motion for a hearing to determine whether the consent motion
8 to amend the plea agreement resulted in modifications, and also
9 to determine whether the defendant has breached the plea
10 agreement.

11 In addition, we filed a memo indicating that because
12 we have requests to examine any letters that have been offered
13 for sentencing purposes affecting the defendant, that I wanted
14 the response from counsel for both sides. So we can address
15 the latter first or go in whatever order you want to proceed.

16 MR. CONSIGLIO: Yes, your Honor. First -- we'll go
17 with the latter first because that's probably the easiest. As
18 the Court indicated, there was I believe letters that were at
19 issue that the media had asked for access to. The Court had
20 asked for the parties' position on disclosure of those letters.

21 THE COURT: I stand to be corrected, but I think the
22 letters that we've had in our possession relate to filings I
23 believe several years ago --

24 MR. CONSIGLIO: Yes.

25 THE COURT: -- in advance of a proposed sentencing

1 date. I'm not aware of anything filed recently.

2 MR. CONSIGLIO: Right. I believe those letters are
3 all from the 2009 era.

4 THE COURT: That's right, 2009.

5 MR. CONSIGLIO: And the defense has noted to the
6 Court that some of these letters, there are special
7 circumstances and conditions that they would not like some of
8 those letters disclosed publically, and in addition that these
9 letters are premature for being qualified as judicial records,
10 because they actually haven't been considered by the Court for
11 sentencing at this time.

12 The government's position with respect to the letters
13 is the same as it's been with respect to other similar requests
14 and other related cases, specifically United States vs.
15 Michael Toole. The Court first needs to make a determination
16 whether these letters are judicial records. And second, if
17 they are judicial records the Court needs to make a balance of
18 the various factors in the law, whether they qualify for First
19 Amendment disclosure or whether there's a common law privilege
20 for disclosure of such judicial records.

21 At this stage, from having spoken with defense
22 counsel, I believe they are in the process of getting some of
23 these letters back or getting them back before they become
24 judicial records for the Court's consideration, and reviewing
25 these letters under that legal authority so they can make

1 appropriate determinations on disclosure to the public in light
2 of the status of judicial records.

3 So, I believe that issue actually is premature at
4 this stage until there actually are letters that are going to
5 be submitted to the Court for its actual consideration in
6 sentencing.

7 THE COURT: That's correct. Prior to the sentencing
8 in 2009, which didn't occur, those letters were filed, and the
9 Court had no reason to examine those letters because there was
10 no sentencing.

11 We will be having a sentencing date in the near
12 future, hopefully, and any letters that we have we will examine
13 prior to sentencing, and I'll just wait for a response from the
14 defense, okay?

15 MR. ZINN: Thank you, your Honor. David Zinn on
16 behalf of Mr. Mericle. We -- the defense did submit letters
17 four years ago in anticipation of a sentencing at that time.
18 Our plan now, in light of the passage of time, would be to
19 submit a new package of letters. Some of the letters may be
20 the same as they were before, some are likely to be updated and
21 some are likely to be new. And so at this point in time we
22 agree with the government that the records are not judicial
23 records at this point because they haven't been presented to
24 the Court for its consideration, and we'll be updating that
25 package soon in advance of the sentencing.

1 There are likely to be in the new package, as there
2 were in the old package, some privacy considerations that some
3 of the letter writers may have in particular about personal,
4 financial or medical information that may be in some of the
5 letters, and we will identify for the Court in the submission
6 which letters may deserve to remain private in light of the
7 interest of the parties in the letters, that have written them
8 and referenced it.

9 THE COURT: That's fair enough. And when that time
10 comes and you have filing prior to the next sentencing date --
11 I stand to be corrected, but I always looked upon the letters
12 in favor of a defendant as if those individuals appeared as
13 character references during the sentencing hearing. That would
14 be public.

15 MR. ZINN: I understand, your Honor, there may be
16 some portions of some letters or some letters in there that are
17 so confidential that there may be reasons to keep the letters
18 themselves private and have the information that would be the
19 subject of the Court's decision-making at sentencing public and
20 in the form of a discussion at hearing.

21 THE COURT: Fair enough. We'll wait. We'll wait
22 until you do that.

23 MR. ZINN: Thank you, your Honor.

24 MR. CONSIGLIO: Now, your Honor, with respect to the
25 other matter. The Court noted that there was a series of

1 motions that were filed over the course of the last couple of
2 weeks with respect to the status of this case. In addition,
3 the Court would note that back on January 19 of 2011 there was
4 a consent motion to amend plea agreement, which was pending
5 before this Court. All of those motions and that motion from
6 January 19 of 2011, they have been resolved pursuant to the
7 superseding consent motion to amend the plea agreement.

8 Now, that motion was filed on the record two days ago
9 and as presented for the Court today. And your Honor,
10 consistent with the obligations under the Federal Rules of
11 Criminal Procedure, particularly Rule 11, what we think is
12 appropriate for today's proceeding is essentially to go through
13 with the defendant the amendments to the agreement, just to
14 make sure that the defendant is acknowledging and agreeing to
15 these change in terms, and having the parties represent to the
16 Court, in open court, these change in terms, and that's
17 ultimately for the Court to accept these change in terms as
18 they are -- as occurs in a regular plea agreement.

19 In this case we already have a plea agreement, which
20 is -- and 90 percent of it remaining the same. It's just there
21 are a variety of terms that are changed.

22 THE COURT: Okay. Listen, we scheduled this on your
23 government's motion for a hearing to determine whether the
24 consent motion to amend the plea agreement resulted in
25 modification of the plea, and for hearing to determine whether

1 the defendant has breached that plea agreement.

2 You're telling me that that has been resolved without
3 the necessity of a hearing?

4 MR. CONSIGLIO: Yes, your Honor. All those motions,
5 all the litigation dealing with before this superseding consent
6 motion to amend plea agreement, they will become mute and be
7 withdrawn by both parties once the Court accepts the
8 superseding consent motion to amend plea agreement.

9 THE COURT: Okay.

10 MR. CONSIGLIO: And with that in mind, what we
11 respectfully ask the Court to do, because of this Rule 11 in
12 general guilty plea context does require the defendant to be
13 taken under oath, we can either place the defendant under oath
14 at this stage or acknowledge that in previous proceedings, his
15 previous guilty plea proceeding was under oath. Perhaps in the
16 interest of being true to what Rule 11 requires we should take
17 an oath.

18 THE COURT: And we have the superseding consent
19 motion to amend the plea agreement. That's been filed of
20 record, hasn't it?

21 MR. CONSIGLIO: It has, your Honor.

22 THE COURT: And Mr. Mericle is here. Mr. Mericle,
23 you're aware of this consent motion to amend the plea
24 agreement?

25 DEFT. MERICLE: Yes, I am, your Honor.

1 THE COURT: As in the case of the last plea
2 agreement, you authorized your lawyers to negotiate those
3 changes in your behalf?

4 DEFT. MERICLE: Yes, your Honor.

5 THE COURT: As a matter of fact, I think you have
6 signed the changes as well as counsel, isn't that correct?

7 DEFT. MERICLE: That's correct, your Honor.

8 THE COURT: Okay. And they would stand as amendments
9 to the plea agreement, and I just want to make it clear that
10 the original plea agreement stands of record except for the
11 changes that have been made. And an important provision being
12 -- I'm not sure what the superseding consent motion does, but
13 there will be no opportunity to withdraw your plea or sentence
14 or recommendations because the Court is not completely bound by
15 the plea agreement. You understand that?

16 DEFT. MERICLE: I do, your Honor.

17 THE COURT: So what do you want to talk about now?

18 MR. CONSIGLIO: Your Honor, beyond that, and I'll --
19 just for making the record completely clear, this document, the
20 superseding consent motion to amend plea agreement changes
21 certain terms. You've reviewed it in the general sense with
22 Mr. Mericle. If the Court would like, I could read through
23 these amendments on the record if the Court thinks that's
24 necessary. The defendant has had ample opportunity with
25 counsel to review these amendments in great deal. Just to

1 summarize them in broad strokes --

2 THE COURT: I have a copy of what you filed, and the
3 only person who executed a copy is Mr. Winning. Are you
4 telling us that the original of what I have has been signed by
5 the lawyers as well as Mr. Mericle?

6 MR. CONSIGLIO: Yes, your Honor. The copy that was
7 signed, if you look at it, there were multiple signature pages
8 attached to the copy that was filed, because as you'll recall,
9 this was executed at the beginning of this week. And we had
10 lawyers in four cities who were trying to sign this document in
11 order to get it signed and filed with the Court in time for
12 today's proceeding, we had the various signature pages that you
13 will see in the filed copy.

14 THE COURT: Okay. So you're satisfied with my Rule
15 11 colloquy of Mr. Mericle concerning these changes?

16 MR. CONSIGLIO: As long as the record clearly
17 reflects that the terms of the agreement that are amended are
18 essentially as follows: That the base offense level, absent
19 downward departure or adjustments, is an eleven. The
20 government is going to be filing a 5K1.1 motion of at least one
21 level. The defendant has the right to request a larger
22 downward departure motion for substantial assistance pursuant
23 to 5K1.1. And the government reserves the right to argue
24 against a further reduction under 5K1.1.

25 The parties recommend that there will be no

1 acceptance of responsibility awarded in this case. In
2 addition, the parties also recommend there will not be any
3 other enhancements, upward adjustments or upward departures
4 from the offense level in calculating the sentencing
5 guidelines. The defense will be able to seek a downward
6 departure for substantial and extraordinary service and good
7 works within the community, and the government reserves the
8 right to argue against such a departure.

9 And at the time the defense will also be able to have
10 the authority to ask for a variance below the guidelines under
11 Section 3553(a). If the defense requests for a sentence of
12 probation or home confinement, the government will take no
13 position with respect to that imposition of such sentence. The
14 government will recommend that with a 5K1.1 motion being filed,
15 that we'll recommend a sentence at the bottom of the guideline
16 range as determined by the Court.

17 And then there's also language that explains the
18 implications for the immunity provisions in this agreement, and
19 what can be used for the determination of these motions. In
20 particular, the immunity information can be used by the Court
21 for a determination of the downward departure motion pursuant
22 to 5K1.1 and the United States Sentencing Guidelines Section
23 1B1.8.

24 THE COURT: Okay. Except -- your motion asked for
25 the hearing for us to determine whether or not the plea

1 agreement was breached and whether additional offenses were
2 committed by the defendant, you're telling us that has been
3 resolved so that we don't need a hearing on that issue?

4 MR. CONSIGLIO: Yes, your Honor, that has been
5 resolved. The Court's acceptance of the superseding consent
6 motion, those matters are resolved.

7 THE COURT: All right. Does the defense wish to
8 address what he's addressed?

9 MR. ZINN: Nothing further, your Honor. I think Mr.
10 Consiglio has accurately summarized the terms of the
11 superseding consent motion and the amendments to the agreement.

12 MR. CONSIGLIO: Okay.

13 THE COURT: This has been an expensive trip for all
14 of you. Because I expected that we would be having a hearing,
15 and now we don't need a hearing because everything is wrapped
16 up in that superseding consent motion, is that correct?

17 MR. CONSIGLIO: That's correct.

18 THE COURT: All right. Next important thing will be
19 for us to set a date for sentencing. Would you agree?

20 MR. CONSIGLIO: Yes, your Honor.

21 MR. ZINN: Yes, your Honor.

22 THE COURT: All right. Before you leave, check with
23 my case administrator, who is retiring at the end of the week.
24 But she will be able to give you a date for sentencing. And
25 then you can file anything you want in advance of sentencing.

1 And you say you're going to be providing me with letters for
2 the Court to consider in connection with the sentencing?

3 MR. ZINN: That's correct, your Honor. I anticipate
4 that we'll be filing a sentencing memorandum that would outline
5 various arguments relating to the anticipated sentencing. We'd
6 be filing along with that letters that would likely be
7 referenced in the memorandum.

8 THE COURT: All right. And I'm inclined to allow
9 those letters, if we considered them, to be made public.

10 MR. ZINN: I understand, your Honor.

11 THE COURT: Okay?

12 MR. ZINN: And we will identify for the Court if
13 there are particular letters that have personal, medical,
14 confidential, financial information in them.

15 THE COURT: That has nothing to do with the
16 sentencing of the defendant.

17 MR. ZINN: I agree, your Honor.

18 THE COURT: And I don't know that that wouldn't be
19 respected by the media, to delve into the personal lives of
20 people who are offering letters in support?

21 MR. ZINN: I understand, your Honor.

22 THE COURT: Do you have any --

23 MR. CONSIGLIO: Nothing further, your Honor.

24 THE COURT: All right. And you have no problem with
25 what I've just stated for the record?

1 MR. CONSIGLIO: That appears to be consistent with
2 the law in these matters, yeah, that's fine.

3 THE COURT: And the defense?

4 MR. ZINN: Yes, we're fine, your Honor. As I said,
5 having not seen the letters yet because some of them aren't
6 written, it's hard for me to evaluate, you know, where there
7 might be these confidentiality interests. But we will bring
8 that to the Court's attention, so there's no mystery about
9 which letters involve potential privacy interests and which
10 don't.

11 THE COURT: And I have not seen the letters either.

12 MR. ZINN: That's correct, your Honor.

13 THE COURT: Okay.

14 MR. ZINN: Thank you.

15 THE COURT: Mr. Mericle, you paid these lawyers a
16 good price to be here today. And the government likes to be
17 here anyway. So we'll adjourn, if there's nothing else you
18 have to bring to my attention.

19 MR. CONSIGLIO: No, your Honor.

20 MR. ZINN: No, your Honor.

21 (10:13 a.m., court adjourned.)

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REPORTER'S CERTIFICATE

I, DIANA L. GILBRIDE, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

/s/ Diana L. Gilbride
Diana L. Gilbride, RMR, FCRR
Official Court Reporter

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